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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SAVAIR MFG. CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT J. SOLNER
Attorney for Respondent
1100 N. Woodward
Birmingham, Michigan 48011
642-2555

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

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QUESTION PRESENTED

The Respondent would add the following question as presented by this case and would request a reply by the Petitioner thereto: Whether the failure of the Regional Director of the National Labor Relations Board, upon receipt of an employee's letter protesting conduct by the

Union, to inform the Union and Employer of such letter or to inform the employee that he could appear at the hearing on objections to the election was a violation of 29 CFR §102.69 requiring that the Regional Director investigate objections to an election[1]

REGULATION INVOLVED

The pertinent portion of 29 CFR §102.69 (a) and (c) as follows:

> "Section 102.69 Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing. (a) * * * Within 5 days after the tally of ballots has been furnished, any party may file with the regional director four copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served upon each of the other parties by the party filing them, and proof of service shall be made.
>
> (c) If objections are filed to the conduct of the election on conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer."

STATEMENT

The Respondent would add the following additional facts not included in the Petitioner's statement.

Pursuant to timely objections filed by the Respondent to the representation election, the Regional Director of the National Labor Relations Board determined that the objections raised substantial and material factual issues which required a hearing. At least ten (10) days prior to the hearing the Director received a letter protesting the Union's conduct from an employee, Jack Reibling. The Director did not notify either of the parties that such letter was received nor did the Director tell the writer that he could appear at the upcoming hearing. Neither the employer nor the union was ever informed by the National Labor Relations Board as to the contents or objections contained in the letter. Without any apparent investigation of the matter, the Director answered Mr. Reibling's letter by saying in part:

> "Some of the alleged conduct that you set forth may not necessarily be grounds for setting the election aside such as the buying of drinks or the union's promises of what it would accomplish if it were to be selected as bargaining agent." (Appendix pp. 11b-12b)

Mr. Reibling did not testify at the hearing and all of the Employer's objections to the election were held to be without merit. The Board adopted the findings and recommendations of the Hearing Officer and certified the Union as bargaining representative on March 3, 1971.

On or about April 1, 1971, the company learned of the emlpoyee's letter of protest. On April 7, 1971, the com-

pany requested a rehearing on objections to the election which was denied on June 17, 1971. The court below indicated that the question concerning the Director's conduct was without merit. (Appendix p. 18b).

ARGUMENT

A. The decision of the Court of Appeals for the Sixth Circuit, that a union's attempt to recruit employees to sign union authorization cards by informing them that those who do so will not be required to pay a fee should the union be successful is impermissable, is legally sound and review thereof by this Court is not warranted.

1. The paramount purpose of the National Labor Relations Act is to insure that employees are free to select or reject a collective bargaining representative in an atmosphere devoid of restraint or coercion by either the union or employer. Inducements offered to employees by the union or employer destroy the free choice of the employees if they are material and if they are likely to have an appreciable effect upon the average mind. *NLRB v. Gorbea, Perez & Morell S. en C.*, 328 F 2d 679 (CA 1, 1964). The danger of destroying the laboratory conditions of a representation election are especially great where the inducement is economic. The courts have many times recognized that the promise of economic benefit is likely to have an undue effect upon employees' freedom of choice and thus have prohibited an employer from giving a wage increase to defeat unionization, *NLRB v. Exchange Ports Company*, 375 US 405, 84 S Ct 457, 11 L Ed 2d 435 (1964) or to promise a wage increase if the union is defeated. *NLRB* v. *Bailey Company*, 180 F 2d 278 (CA 6, 1950). The court below held that it was likewise im-

proper for a union to promise to waive their initiation fee if an employee signed an authorization card.

In its petition the National Labor Relations Board argues that the lower court was incorrect in concluding that a waiver of an initiation fee constitutes a promise of benefit which improperly coerces an employee because an employee can sign a card and then proceed to vote against the union. Thus in the event the union wins the election, there would be no fee in the event that the union loses the election, there would be no fee. The Respondent submits that this view overlooks the fact that employees should not be required to compromise their principles and to accept even this tenuous alliance with the union by indicating a showing of interest when in fact there is none. How can it be said that such a procedure is not coercive when at the very first step in the election process an employee who does not favor the union must sign one of their cards in order to avoid paying a fee should the union prevail. The Respondent submits that economic inducements in whatever form are inherently dangerous and that the economic inducement involved here did destroy the employees' freedom of choice.

2. The decision of the lower court is correct in view of the fact that the campaign procedure used by the union was confusing as well as coercive. In determining whether there has been an interference with employees' freedom of choice, all relevant facts and circumstances of the case must be considered. *NLRB* v. *Gilmore Industries, Inc.*, 341 F2d 240 (CA 6, 1965). The court below noted that there was some controversy as to whether the union threatened to fine employees who would not sign cards or whether the union offered to waive the initiation fee for those who did. (Appendix p. 15b). Significantly, there was no issue of possible threats of a fine in either of the two cases claimed

by the Respondent to conflict with the decision of the court below, namely *NLRB* v. *G. K. Turner Associates*, 457 F 2d 484, 489 (CA 9, 1972) and *NLRB* v. *DIT-MCO*, 428 F 2d 775, 778, 779 (CA 8, 1970). A great deal of confusion can arise out of the campaign tactics of the union in this regard. Employees may wonder whether the union is going to reward economically those who favor the union's program or whether the union is threatening punishment for those who do not. There was testimony that the employees in the instant case shared such confusion and that *some* of them received a clarification at an employee meeting subsequent to the filing of the petition for the election. See opinion of court below p. 16b of Appendix. Thus, the court below, in surveying the pre-election conduct of the union as a whole, correctly determined that the intimidation, coercion and confusion generated by the union's offer of economic benefit conditioned on the outcome of the election destroyed the employees' freedom of choice.

B. The failure of the Regional Director upon receipt of an employee's letter protesting improper conduct by the union to inform the union and employer of such letter or to inform the employee that he could appear at the hearing on objections to the election was a violation of 29 CFR §102.69 (a) and (c).

1. In adopting regulations to effectuate the purposes of the National Labor Relations Act 29 USC 151 et seq., the Board formulated 29 CFR 102.69 which provides that it is the function of the Regional Director to investigate objections to a representation election.

The requirement that the Direction investigate elections and order a hearing if necessary indicates that reliance is placed upon the Director to act fairly to *both* sides in assessing the validity of an election. The regulations must

be construed in a manner most likely to protect public rights created and defined in the National Labor Relations Act. On the contrary, the Director's actions concerning information bearing upon the fairness of the election was in effect suppressed in this case. The employee was not told of the hearing on objections and was in fact given the impression that his objections were without merit. At the very least, he should have been directed to talk to his employer concerning any possible information he might have. Respondent submits that the public policy behind the Act requires that the Director ought to encourage rather than discourage the presentation of any relevant information which his investigation discloses in order that all available evidence be considered in formulating a decision.

The Petitioner contended that the Director acted properly since the employee was not a "party" as required by §102.69 and not entitled to file an objection. In their zealousness to enforce the spirit of the Act, courts have disregarded the technical requirements of the regulations. Thus it has been held that the Regional Director ought to have investigated an objection even though a copy thereof was not served upon the opposite party by the company as required by §102.69 (a). *NLRB* v. *Brown Lumber Company*, 336 F 2d 641 (CA 6, 1964). Likewise it was held in *NLRB* v. *Mrs. Weaver's Salads*, 439 F 2d 1116 (CA 6, 1971) that the Director acted arbitrarily in declining to investigate an objection because it was not timely filed as required by §102.69 (a). Thus, the courts have ignored the technical requirements of §102.69 where they conflicted with the overriding policy of insuring that employees have a free choice in accepting or rejecting bargaining representatives. The duty of the Director to investigate will promote fairness only if he is not allowed to close his eyes to evidence which is likely to be relevant.

At the time the letter was received, the Respondent had filed a written objection to alleged false promises on the part of the union. (Objection #3 Appendix p. 2b).

The Director was necessarily informed that the employee was complaining of false promises on the part of the union. The only action taken by the Director, however, was to inform Mr. Reibling that his objections were probably nonmeritorious. Respondent respectfully submits that the Director violated the spirit of the Act by failing to investigate the employee's complaint and by failing to inform him that he could testify at the hearing.

CONCLUSION

The Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

ROBERT J. SOLNER
Shea, Shea, Heath & Solner
1100 N. Woodward
Birmingham, Michigan 48011
642-2555

March 5, 1973.

APPENDIX

HEARING OFFICER'S REPORT ON OBJECTIONS AND RECOMMENDATION

(November 12, 1970)

A Notice of Hearing issued by the Acting Regional Director for the Seventh Region of the National Labor Relations Board on October 8, 1970. A hearing was held before me on October 28, 1970, at Detroit, Michigan. The hearing was conducted in accordance with the provisions Section 102.69(e) of the Board's Rules and Regulations, Series 8, as amended. All the parties were presented and afforded full opportunity to be heard, to examine the witnesses, to introduce relevant evidence and to present oral argument at the close of the hearing.

In the Notice of Hearing, the Acting Regional Director ordered that the hearing be held for the purpose of resolving issues raised by Employer's Objections to Election, numbers 1 through 4. The Objections are set forth verbatim as follows:

1. That the Union, and persons acting on its behalf, through misrepresentations, trickery and threats deceived certain employees into believing that if they failed or refused to sign a card requesting an election and the union was successful, they would be fined from Twenty and 00/100 ($20.00) Dollars to Two Hundred and 00/100 ($200.00) Dollars, before they could become members of that union, which acts interfered with the employees' right to exercise a free choice.

2. That the union, and persons acting on its behalf, through misrepresentations and threats, deceived the employees into believing that if they signed a card their

name was on record with the N.L.R.B., and they had agreed to vote for the union and they could not change their vote at the time of the election.

3. That the union and others acting in its behalf, circulated and distributed information just prior to the election that they could guarantee to the employees that they would receive a wage scale comparable to the tool and die shops in the area, when in fact these employees are employed in semi-production general type machine shop.

4. That the N.L.R.B.'s representative restricted the observers from assisting any employee and then failed to assist illiterate employees, and as a consequence, their ballot was either voided or did not express their true intent.

The objecting party, the Employer moved at the hearing to withdraw its Objection No. 3. It is recommended that the Board approve Employer's request to withdraw Objection No. 3.

With respect to Objection No. 2, no evidence was adduced in support of that Objection and I recommend that the Board therefore overrule Objection No. 2.

The Employer produced testimony of six employee-witnesses to support its objections. Two of these witnesses, Stafford and Neck testified with respect to Objection No. 4. With respect to Objection No. 1, only two witnesses testified in regard to campaign trickery or threats relating to the fining of an employee who failed to sign union authorization cards prior to the election. Of these two witnesses, Bridgeman was twice recalled and gave the most extensive testimony. According to Bridgeman's testimony, two agents of the Union made reference to this fine or assessment. They were Secretary-Treasurer of

the Union Alfred Smith, who conducted employee organizational meetings, and Bennie McKnight, an employee card solicitor who campaigned on behalf of the Petitioner. The agency of Smith is not disputed. However, the Petitioner claims that McKnight, as an unpaid card solicitor and employee of the Employer, should not be construed to have acted as an agent on behalf of the Petitioner. The record clearly establishes that McKnight was authorized to distribute authorization cards on behalf of the Petitioner and was, in fact, the chief employee organizer acting on behalf of the Petitioner. The record also establishes that Smith, who appears to have been in charge of the Petitioner's organizing efforts authorized McKnight to explain the Petitioner's initiaion fee policy to employees, after Smith had become aware that questions were being raised by employees on that issue. Under these circumstances, it would appear that, although McKnight was not a paid employee of the Petitioner, he was, an agent of the Union and acting within the scope of his authority in representing the Petitioner's initiation fee policy, though he may have done so inaccurately. *Hampton Merchants Association*, 151 NLRB 1307.

According to the uncontradicted testimony of Bridgeman, it appears that McKnight, in obtaining signatures from employees of union membership and authorization cards, told employees that they would be subject to a fine or an assessment fee if they did not sign the card in the eventuality that the union won the election. There was, therefore, a great deal of discussion among the employees as to whether they should sign the union authorization and membership card in view of the fact that regardless of their desires and how they would actually vote, they could save themselves some money in the event the union were successful. No specific amount was mentioned. Bridgeman used the word "fine" interchangeably with

"assessment" and "initiation fee". His testimony is not entirely clear that McKnight used the word "fine". In any event, pror to the filing of the petition, because of the questions raised by employees, according to Bridgeman, McKnight telephoned Smith to find out what the union's policy was. The next day, employees asked McKnight whether it were true that they would have to pay a "fine", McKnight answered in the affirmative and said that the employees could call Mr. Smith if they so desire and he gave them the telephone number. Subsequent to the filing of the petition, an employee meeting was held at a rented hall under the supervision of Mr. Smith at which approximately 20 employees were in attendance. According to Bridgeman, at the meeting the benefits of unionization were discussed and questions were invited from the floor. An employee asked Mr. Smith: " * * * if there was a fee, not fine, we can't call it a fine, to join, and an initiation fee." And: "If there was a fee, you know if you didn't sign the slip [union authorization and membership card] and it was, in turn, [sic.] in before the election. There is a small fee, it was never stipulated what amount the fee should be." According to Bridgeman, Smth answered: "There would be a small fee." No amount, according to Bridgeman, was ever specified. Bridgeman further testified that subsequent to that meeting, and prior to the election, Bennie McKnight told employees that if they signed the union membership and authorization card before the election, there would be no union "initation fee" if the union were successful at the election. Bridgeman was recalled to the stand twice.

The second time he was recalled, he testified that McKnight referred to a "fine" after the filing of the petition but was unable to specify the circumstances such as the contexts of the conversations and when and where they

occurred. Under these circumstances and because of his proclivity to confuse and interchange the characterization "fine" with "initiation fee", it is my finding that there is insufficient evidence based upon Bridgeman's testimony that a threat of a "fine" occurred either before or after the filing date of the petition. Upon cross-examination, Bridgeman conceded that what Smith said at the meeting was that an initiation fee would be waived for all card signers who executed their cards before the election in the eventuality that the union won the election.

One other witness, employee Rice, testified that McKnight stated when soliciting that: "You would get fined if you did not [sign a card]." No amount was specified. Viewing this testimony in relation to Brdgeman's testimony, it would appear that McKnight made the statements with respect to the purpose of signing a card prior to the filing of the petition when he was soliciting the necessary showing of interest for the Union and it would appear to have occurred prior to the filing of the petition. In any event, it is my conclusion that the objecting party has failed to establish that the Union engaged in a threat to employees to assess a fine upon those who failed to sign cards on or after the filing date of the petition. Conduct, of course, occurring prior to the filing of the petition is not grounds for setting aside the election.[1] Whether or not a sufficient valid showing of interest was obtained, constitutes a matter for administrative determination. With respect to what transpired after the filing of the petition, Smith testifid that he, at the meeting, referred to by Bridgeman, told the employees that an *initiation fee* would be waived not only in the eventuality of the union win-

[1] *Goodyear Tire and Rubber Co.*, 138 NLRB 453.

ning the election, but also in the eventuality of the union negotiating a contract. There is no evidence, nor any contention, that the Union misrepresented to employees that they would have to become members immediately upon the certification of the union as bargaining agent.

In reviewing the testimony of the witnesses, it is clear to me that what the Union did through Smith and through McKnight was to inform employees that an initiation fee would be waived in the eventuality of a successful election for the Union. Whatever confusion may have existed with respect to terminology utilized by McKnight prior to the filing of the petition, it seems clear that this was the expressed policy as set forth at the initial organizational meeting after the filing of the petition. However, the Employer argues that the waiver of an initiation fee constitutes an economic inducement offered by the Union which impeded employees free choice. The Employer further argues that it is an economic inducement contingent upon how employees vote in the election and on the results of the election, and as such, constitutes an objetcionable inducement. This argument, however, has been rejected by the Board. In the *DIT-MCO, Inc.*, 163 NLRB No. 147 case, the Board held that a provisional waiver of initiation fees prior to election is not improper regardless of whether it is contingent upon the results of the election. The Board pointed out that it would be unreasonable to conclude that a statement by the union during an elction to the effect that an assessment of money or an obligation to pay money which could be avoided by the execution of a union membershop card prior to the election, would influence a vote in favor of the Union when the simplest way to avoid the incurrence of any financial obligation would be to vote "no". Thus, it would appear that any threat to impose a "fine", "assessment" or "initiation fee", or "payment

to join the union", although it may induce an employee to execute a union authorization membership card, would more probably induce him to vote "no" at the election. It is my conclusion and recommendation, therefore, that the Employer has failed to show that the union has engaged in conduct which would have interfered with the free choice of an election and, therefore, I recommend that the Board overrule Objection No. 1.

Objection No. 4

Employer's observer Raymond Neck, testified that at the election he was aware that employee Stafford was somewhat illiterate, but was unaware of the extent of his illiteracy and did not know that Neck would be unable to understand the ballot. In any event, Neck testified that Board Agent Bolton, in the presence of the two observers, including Bennie McKnight and Neck, instructed the voters on the manner in which they should cast their ballot. He did this as the voters approached the identification table. Stafford was included in a group of 6 or 7 voters waiting in line. Bolton orally instructed the voters as to the mechanics of voting. He then idividually asked each of the 6 or 7 voters including Stafford whether they understood his instructions. According to Neck, he asked Stafford if he understood the instructions and that Stafford either nodded his head or answered "yes". Neck testified that he did not volunteer to assist Bolton in this instruction. The Employer's Counsel attempted to elicit testimony that Bolton instructed the observers not to speak to one another nor to the Board Agent, and therefore this was the cause of Stafford's failure to understand the voting procedure. Neck's testimony, however, reveals that Bolton told the observers not to address the *employees*, and that he, Neck, assumed Stafford understood the instruc-

tions, and, therefore, made no attempt to advise the Board Agent of any further necessary instruction.

After Stafford received his ballot, he went into the booth and without unfolding his ballot, placed a mark on the unprinted back portion of the ballot which was exposed. He then returned and deposited the ballot. Thus, Stafford's ballot constituted the one void ballot cast in the election. Stafford testified that when he was standing in line to vote with about 6 other employees that: "I think the Board Agent was trying to tell me [how to vote] but I didn't understand." He testified that he didn't recall what the Board Agent said. When asked: " • • • did you vote?" He testified: "I didn't, I just marked the paper, I can't read, I didn't unfold it, I didn't want the Union." In cross-examination he testified:

> Q. Did you listen to him give them [the other voters] the instructions?
>
> A. No.
>
> Q. You weren't listening?
>
> A. No. He was talking about how to vote but I wasn't paying no attention.
>
> Q. In other words, you ignored him?
>
> A. Yes.

Stafford testified that when asked to sign a union authorization membership card, he told McKnight: " • • • Rather than pay, you can fill it out for me, I can't read or write. I don't want the Union but I don't want to pay if it comes in." Neither Bolton nor McKnight were called to testify.

Contrary to the Employer's argument, I find that the NLRB agent conducting the election did ask each voter

individually whether he understood his instructions and that Stafford answered in the affirmative. Further, contrary to the Employer, I conclude that the failure of the Employer's observer to offer assistance was not caused by any instruction of the Board Agent, but resulted from his own conclusion that Stafford did not need assistance beyond that given by the Board Agent.

The Employer further argues that the Union observer should have offered to assist Bolton in giving special instructions to Stafford, or at least should have disclosed the fact that Stafford could not read and write since Stafford advised him of this fact when McKnight filled out the Union authorization membership card. I did not agree with the Employer that either the Board Agent or any of the observers engaged in any conduct which deprived Stafford of the opportunity to cast an intelligent choice. At most, Stafford's testimony indicated that sometime apparently preceding the filing of the petition when McKnight was soliciting a showing of interest for the petition, McKnight was advised of Stafford's illiteracy. Afterwards, the petition was filed and an election campaign ensued. During the election campaign, the usual Board Notices, with replicas of the ballot were posted. It would be totally unjustified to expect that at the election McKnight should have concluded that despite Stafford's own positive assurance that he understood Bolton's instruction and despite his exposure to the sample ballots and the propagandizing of both parties that Stafford did not know how to cast a ballot. The Board Agent not only explained the mechanics of voting to a group of employees in close proximity as they waited to vote but he also made an individual effort in addressing each individual employee as to whether they specifically understood his instructions. Stafford answered in the affirmative.

Certainly the Regional Director is charged with the obligation of conducting elections under the highest standards possible to afford a free choice for all voters. A failure to make clear the election procedure because of communication problems, such as inadequate instructions to foreign speaking voters where such problem was known to exist constitutes grounds to set aside the election. *Fibre Leather Mfg. Corp.*, 167 NLRB 393. However, it is my conclusion that the Employer has failed to establish that Stafford did not have the opportunity to cast a ballot because of the failure of the Board Agent or because or some trickery on the part of the observers. No amount of care and precaution can overcome such undisclosed resistance to instruction as exhibited by Stafford. I therefore recommend that Objection No. 4 be overruled. Cf. *Craft Manufacturing Co.*, 122 NLRB 341.

Conclusion

For the reasons stated above, it is recommended that the Board overrule Objections 1, 2, and 4, and approve the withdrawal of Objection No. 3 and issue a Certification that Mechanics Educational Society of America, AFL-CIO has been designated and selected by a majority of the employees of the above-named Employer in the unit herein involved as their representative for the purposes of collective bargaining and pursuant to Section 9(a), as amended, said organization is the exclusive representative of all employees in such unit for the purpose of collective bargaining with respect to rate of pay, wages, hours of employment, and other conditions of employment.

Dated at Detroit, Michigan, this 12th day of November, 1970.

/s/ THOMAS R. WILKS,
THOMAS R. WILKS,

Hearing Officer, National Labor Relations Board, Seventh Region, 500 Book Building, 1249 Washing-

NATIONAL LABOR RELATIONS BOARD

Region 7

500 Book Building, Detroit, Michigan 48226
Telephone 226-3200

October 21, 1970

Mr. Jack E. Reibling
29287 Dembs
Roseville, Michigan 48066

Re: Savair Manufacturing Company
Case No. 7-RC-10098

Dear Mr. Reibling:

This will acknowledge your letter of October 15, 1970, and its contents have been noted.

You indicate that you want to object to the election that was conducted in the above matter on September 22, 1970 for certain enumerated reasons. Although this is commendatory on your part to bring to our attention conduct which you believe had a coercive impact upon the results of the election, I must regretfully advise you that since you are not a party to this representation proceeding, you have no standing under the law to file objections to the election. Additionally, such objections must be filed within five working days after the election has been conducted. Some of the alleged conduct that you set forth may not necessarily be grounds for setting the election aside such as the buying of drinks or the union's promises of what it would accomplish if it were to be selected as bargaining agent. Nevertheless, I wish to observe that objections to the election were indeed timely filed by one of the par-

ties to this proceeding and following preliminary investigation of same has been set down for hearing and should be heard on October 28, 1970. Although the objections as filed do not specifically encompass the complaints you raise in your letter, yet it may very well be that some of these may be adduced in the hearing.

If you have any further questions, please feel free to call upon this office.

Very truly yours,

/s/ Jerome H. Brooks
Jerome H. Brooks
Regional Director

BG:lap

No. 72-1225

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

National Labor Relations Board, *Petitioner*, v. Savair Manufacturing Company, *Respondent*.	On Application for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed December 11, 1972.

Before: Celebrezze, Peck and Kent, Circuit Judges.

Peck, Circuit Judge. This case is before the Court upon a petition by the National Labor Relations Board for enforcement of its order issued against the respondent Savair Manufacturing Company. On September 22, 1970, an election by secret ballot was conducted among the Company's production and maintenance employees, which the Union (The Mechanics Educational Society of America) won by a vote of 22 to 20, with one ballot challenged and one ballot declared void. The Company then filed timely objections to conduct which it contended affected the results of the election, alleging, *inter alia*, that the Union deceived employees into believing that they would be fined an unspecified amount if they failed to sign an authorization card and if the Union won the election.

An evidentiary hearing was held before a Hearing Examiner to resolve the issues raised by the Company. In recommending that the Company's objections be overruled, the Hearing Examiner found that there was insufficient evidence upon which to conclude that such a threat

occurred either before or after the filing date of the representation petition. He also found that the Union offered to waive the initiation fee for all employees who executed authorization cards prior to the election should the Union win the election, but that this offer of waiver was not objectionable under the Board's policy enunciated in *DIT-MCO*, 163 NLRB 1019, enf'd. *N.L.R.B.* v *DIT-MCO*, 428 F.2d 775 (8th Cir. 1970) He concluded that the election was not improperly conducted, and that the Union is the exclusive representative of all employees in the unit for the purpose of collective bargaining. The Company's petition for rehearing was denied, and the Board subsequently granted summary judgment against the Company and ordered it to bargain with the Union. The Company has refused to do so, and the Board has brought this petition for enforcement of its order.

In *Lobue Bros.*, 109 NLRB 1182 (1954), the Board held that a pre-election offer of reduced initiation fees is objectionable when the promised benefit is contingent on how the employees voted in the election or on the results of the election. In *N.L.R.B.* v. *Gilmore Industries*, 341 F. 2d 240 (6th Cir. 1965), the Court adopted the reasoning of the Board in *Lobue* and held that the economic inducement offered by a union in waiving initiation fees for those employees who sign authorization cards if the union wins the election impeded a reasoned choice because, under the circumstances of that case, the employees had been lead to believe that they were receiving an economic benefit far greater than was actually the case. (See also *N.L.R.B.* v *Pafner Automotive and Machine, Inc.*, 400 F.2d 10 (6th Cir. 1968).

In *DIT-MCO, supra*, the Board changed its policy, overruled *Lobue*, and held that an offer to waive initia-

tion fees for those who sign authorization cards prior to an election is permissible whether or not it is conditioned upon the outcome of the election. The Eighth Circuit enforced the Board's order and held that the Board's new policy of not setting aside an election when a waiver of provisional waiver of union initiation fees, whether contingent upon the results of an election or not, was within the Board's discretionary powers to regulate the conditions under which an election may validly be held. 428 F.2d at 779.

In response to the Board's petition to enforce its order, the Company relies upon this Court's decision in *Gilmore*. The Board contends that the *Gilmore* case is no longer viable because in that case the court relied upon *Lobue*, which has since been re-examined and overruled by the Board. In presenting this argument, the Board displays a misunderstanding of the relationship which exists between the Board and this Court. The Board's actions are premised upon the assumption that when the Board changed its position from *Lobue* to *DIT-MCO*, it effectively overruled this Court's decision in *Gilmore*, and that this Court must follow the Board's lead and alter its decision in *Gilmore* accordingly. Such is not the case, and we find no reason, either procedurally or substantively, to alter our decision in *Gilmore*.

We note that while there is no question of fact concerning the offer to waive the initiation fees contingent upon the Union's victory in the election, there was some controversy as to whether or not this procedure was represented to the employees in terms of a "fine". The Hearing Examiner's findings on this issue indicate the confusion concerning initiation fees, fines and assessments

that can be generated in the minds of those involved in a Union election:

"According to the uncontradicted testimony of Bridgeman, it appears that McKnight, in obtaining signatures from employees of union membership and authorization cards, told employees that they would be subject to a fine or an assessment fee if they did not sign the card in the eventuality that the union won the election. There was, therefore, a great deal of discussion among the employees as to whether they should sign the union authorization and membership card in view of the fact that regardless of their desires and how they would actually vote, they could save themselves some money in the event the union were successful. No specific amount was mentioned. Bridgeman used the word 'fine' interchangeably with 'assessment' and 'initiation fee.' His testimony is not entirely clear that McKnight used the word 'fine'. In any event, prior to the filing of the petition, because of the questions raised by employees, according to Bridgeman, McKnight telephoned Smith to find out what the union's policy was. The next day, employees asked McKnight whether it were true that they would have to pay a 'fine', McKnight answered in the affirmative and said that the employees could call Mr. Smith if they so desire and he gave them the telephon number. Subsequent to the filing of the petition, an employee meeting was held at a rented hall under the supervision of Mr. Smith at which approximately 20 employees were in attendance. According to Bridgeman, at the meeting the benefits of unionization were discussed and questions were invited from the floor. An employee asked Mr. Smith: '. . . if there was a fee, not fine, we can't call it a fine, to join, and an initia-

tion fee.' And: 'If there was a fee, you know if you didn't sign the slip [union authorization and membership card] and it was, in turn, [sic.] in before the election. There is a small fee, it was never stipulated what amount the fee should be.' According to Bridgeman, Smith answered: 'There would be a small fee.' No amount, according to Bridgeman, was ever specified. Bridgeman further testified that subsequent to that meeting, and prior to the election, Bennie McKnight told employees that if they signed the union membership and authorization card before the election, there would be no union 'initiation fee' if the union were successful at the election. Bridgeman was recalled to the stand twice. The second time he was recalled, he testified that McKnight referred to a 'fine' after the filing of the petition but was unable to specify the circumstances such as the contexts of the conversations and when and where they occurred. Under these circumstances and because of his proclivity to confuse and interchange the characterizations 'fine' with 'initiation fee', it is my finding that there is insufficient evidence based upon Bridgeman's testimony that a threat of a 'fine' occurred either before or after the filing date of the petition. Upon cross-examination, Bridgeman conceded that what Smith said at the meeting was that an initiation fee would be waived for all card signers who executed their cards before the election in the eventuality that the union won the election."

As indicated by the Hearing examiner's report, most of the facts concerning the misrepresentation to the employees were not considered by the Board because this conduct occurred prior to the filing of the petition, and the Board has determined that conduct occurring prior to the filing

of a petition will not be grounds for setting aside an election. *Goodyear Tire and Rubber Co.*, 138 N.L.R.B. 453 (1962). We do not reach an examination of this policy because we do not agree with the Board that *Gilmore* should be overruled. We simply refuse to believe that the waiver of initiation fees, contingent upon the outcome of an election, whether it is referred to as a fine, an assessment, or a waiver of initiation fees, is not coercive in the context of a union election.

The facts of this case indicate that *Lobue* and *Gilmore* are sound decisions, and we conclude that the Board abused its discretion in declining to follow the *Gilmore* decision. Accordingly, upon a consideration of the arguments presented by both sides to this petition for enforcement, we respectfully decline to follow the Eighth Circuit (*N.L.R.B.* v. *DIT-MCO, supra)*, and the Ninth Circuit (*N.L.R.B.* v. *G. K. Turner Associates*, 457 F.2d 484 (9th Cir. 1972), noting that in neither of these cases was the Court called upon to overrule a controlling precedent of its own.

We have considered the other two arguments which the respondent has presented to this Court, and we conclude that they are without merit. The record indicates that the Board's conclusion that a full and fair hearing was provided to the Company, and its conclusion that an illiterate employee was not precluded from casting a valid vote by the actions of the NLRB representative at the election are supported by a substantial evidence on the record as a whole.

Enforcement of the Board's order is denied.